6-2-2016

State v. Mann Appellant's Brief Dckt. 43745

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43745**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY NO.**
v.	)	**CR 2015-1903**
	)	
JESSE EUGENE MANN,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

_____

HONORABLE JOHN T. MITCHELL
District Judge

_____

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

JENNY C. SWINFORD
Deputy State Appellate Public Defender
I.S.B. #9263
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, Jesse Eugene Mann was convicted of trafficking in marijuana and two misdemeanor offenses for driving without privileges and possession of drug paraphernalia. Mr. Mann asserts two errors on appeal. First, he argues that the district court erred by denying his motion to suppress evidence found in the search of a rental car. Second, Mr. Mann argues that the district court erred by improperly instructing the jury on one of the elements for the offense of possession of drug paraphernalia.

Statement of Facts and Course of Proceedings

The State filed a Criminal Complaint alleging Mr. Mann committed the crime of trafficking in marijuana, a felony, in violation of I.C. § 37-2732B(a)(1)(B) (five to twenty-five pounds). (R., pp.12–13.) This allegation arose out of a traffic stop of a rental car driven by Mr. Mann. (R., p.8.) Mr. Mann was arrested for driving without privileges, and the police's inventory search of the vehicle found marijuana and "a marijuana bong." (R., p.8.) The case was consolidated with ISP0314584, which contained two misdemeanor citations for driving without privileges, in violation of I.C. § 18-8001, and possession of drug paraphernalia, in violation of I.C. § 37-2734A(1). (R., pp.11, 15.)

After a preliminary hearing, the magistrate found probable cause and bound Mr. Mann over to district court. (R., pp.27–29; *see also* R., pp.70–76 (Def.'s Ex. F, preliminary hearing transcript).) The State filed an Information charging Mr. Mann with trafficking in marijuana, driving without privileges, and possession of drug paraphernalia. (R., pp.34–35.) For possession of drug paraphernalia, the State charged:

> That the defendant, JESSE EUGENE MANN, on or about the 8th day of February, 2015, in the County of Kootenai, State of Idaho, did use and/or possess with the intent to use drug paraphernalia, to wit: a bong or pipe used to introduce into the human body a controlled substance, all of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the People of the State of Idaho.

(R., p.35.)

Mr. Mann filed a Motion and Memorandum to Suppress and Dismiss, arguing the evidence found in the rental car must be suppressed because the police officer who conducted the traffic stop did not have reasonable suspicion of a traffic violation and the subsequent search did not fall under any exception to the warrant requirement. (R., pp.46–55.) The State responded in opposition, including an argument that Mr. Mann did not have standing[1] to challenge the search of the rental car. (R., pp.85–98.)

The district court held a hearing on the motion. (*See generally* Tr., p.7, L.1–p.64, L.9; R., pp.99–102). The district court took up the issue of standing first. (Tr., p.7, L.7–p.37, L.15.) Mr. Mann testified. (Tr., p.9, L.14–p.23, L.6.) The district court ruled Mr. Mann did not have a reasonable expectation of privacy in the rental car, which was rented by his "living as married" partner of five years, Ashley Cheney. (Tr., p.10, L.22–p.11, L.2, p.29, L.2–p.32, L.10.) The district court reasoned that the lack of standing resolved all issues raised in Mr. Mann's motion to suppress. (Tr., p.36, Ls.15–20.) Thus,

[1] As noted by the Court of Appeals in *State v. Hanson*, 142 Idaho 711 (Ct. App. 2006), "[T]he word 'standing' is technically inaccurate." *Id.* at 716 n.2. "Nevertheless, the term is often employed as useful shorthand referring to whether the defendant had a privacy interest in a place that was searched such that he or she is entitled to the exclusion of the resulting incriminating evidence." *Id.* The term "standing" will be used in this context herein.

the district court did not address whether the search of the rental car was lawful under the Fourth Amendment. Then, after a brief recess, the district court reopened the matter to determine whether the initial traffic stop was lawful. (Tr., p.37, L.17–p.63, L.23.) Idaho State Police ("ISP") Trooper Clark and Mr. Mann testified, and a video of the stop was admitted into evidence. (Tr., p.40, L.7–p.60, L.4; State's Ex. 1.) The district court found Mr. Mann credible, but Trooper Clark "more credible" as to the purpose for the traffic stop—Mr. Mann's failure to signal for at least five seconds. (Tr., p.61, L.6–p.63, L.1.) The district court then ruled the traffic stop was lawful because Trooper Clark had a reasonable suspicion of a traffic violation. (Tr., p.61, L.6–p.63, L.23.) The district court entered on Order Denying Defendant's Motion to Suppress "for the reasons stated on the record." (R., p.103.)

Mr. Mann proceeded to trial. (R., pp.143–167; *see generally* Tr., p.70, L.1–p.269, L.20.) Trooper Clark testified that he found on the front passenger seat what he believed to be a glass bong "with a burnt residue in one end" that smelled like "burnt marijuana." (Tr., p.118, Ls.7–17, p.120, Ls.6–23; *see also* State's Ex. 2.) Trooper Clark did not smell any burnt or raw marijuana while standing on the side of the road during the traffic stop, however. (Tr., p.131, Ls.18–23.) Next to the bong, Trooper Clark also found "a pipe cleaning tool, a small rubber container which seemed to have a residue or resin inside, and a plastic bag with a brown-like substance in it." (Tr., p.118, Ls.18–21.) In the trunk, Trooper Clark found eight heat-sealed bags of marijuana. (Tr., p.122, Ls.5–17 (Trooper Clark testimony), p.194, L.10–p.198, L.19 (ISP forensic scientist testimony).) The State did not introduce any evidence that the residue found in the bong was from an illegal substance.

After the State submitted its case in chief, Mr. Mann moved pursuant to Idaho Criminal Rule 29 for acquittal on the charge of possession of drug paraphernalia. (Tr., p.208, L.18–p.209, L.10.) He argued that the State must prove he intended to use the bong in Idaho, and the State failed to present sufficient evidence of intent. (Tr., p.208, L.18–p.209, L.10, p.211, Ls.2–17.) The State disagreed, arguing that it presented sufficient circumstantial evidence of intent. (Tr., p.210, Ls.4–12.) The district court denied Mr. Mann's motion and ruled:

> Idaho Criminal Jury Instruction 408 doesn't mention anything about where the defendant needs to intend to use the paraphernalia. The paraphernalia has to be found in the state of Idaho, but the defendant need not intend to use it here in the state of Idaho, and I think there is more than enough circumstantial evidence . . . .

(Tr., p.212, Ls.13–18.) The defense rested shortly after this ruling. (Tr., p.213, L.20; p.241, L.24.)

The district court instructed the jury. (Tr., p.215, L.1–p.226, L.4.) The jury instruction for possession of drug paraphernalia, Instruction No. 12h, provided:

> In order for the defendant to be guilty of Possession of Drug Paraphernalia, the state must prove each of the following:
>
> 1. On or about 8th day of February, 2015
> 2. in the state of Idaho
> 3. the defendant JESSE EUGENE MANN possessed a bong or pipe, intending
> 4. to use it to introduce into the human body a controlled substance.
>
> If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(R., p.191; Tr., p.219, L.24–p.220, L.9 (Instruction No. 12h read to jury).) During closing argument, Mr. Mann attempted to argue that there was no evidence he intended to use

the bong in Idaho. (Tr., p.248, L.12–p.249, L.11.) The State objected to Mr. Mann's argument, and the district court sustained the objection. (Tr., p.249, Ls.12–25.) After the jury was sent out for deliberations, the district court reiterated that "where the defendant intended to use the paraphernalia . . . was not relevant to this case" and "intent to use" in Idaho was not an element of the offense. (Tr., p.258, L.19–p.259, L.1.)

During deliberations, the jury sent a question to the district court. The jury wrote:

> Regarding
> Instruction
> 12h
>
> #3–4 "intending to use"
>
> Does this matter:
>
> 1) defendant intended to use himself?
>
> 2) or use <u>in Idaho</u>? Or elsewhere
>
> 3) is there evidence of tested residue to indicate use?
>
> Please provide the applicable law in writing.

(Aug. R., p.1 (capitalization and underline in original).) For the jury's question 1, the district court instructed the jury to "follow the jury instructions." (Tr., p.264, Ls.1–4.) For the jury's question 3, the district court instructed the jury to "follow your recollection of the evidence." (Tr., p.264, Ls.5–8.) The district court wrote these instructions directly on the jury's question. (Aug. R., p.1.) For the jury's question 2, the district court provided a supplemental instruction to the jury:

> Instruction No. 21
>
> You are instructed that any possession of paraphernalia must occur in Idaho.
>
> If you find defendant possessed paraphernalia in Idaho, you must consider whether the defendant intended to use the paraphernalia. It does

> not matter in which state the defendant formed the intent to use the paraphernalia.

(R., p.202; Tr., p.264, Ls.9–18.) Mr. Mann objected to this instruction. (Tr., p.263, Ls.1–7.) He argued that the instruction eliminated "any jurisdictional requirement that adds to the crime." (Tr., p.263, Ls.5–7.)

The jury returned a guilty verdict for trafficking in marijuana, driving without privileges, and possession of drug paraphernalia. (R., p.203; Tr., p.265, L.9–p.266, L.13.) For trafficking in marijuana, the district court sentenced Mr. Mann to the mandatory minimum of three years fixed, plus four years indeterminate. (R., pp.210–11; Tr., p.278, L.1–p.294, L.22 (sentencing hearing).) Mr. Mann filed a timely Notice of Appeal from the district court's judgment of conviction. (R., pp.210–11, 217–19.)

ISSUES

I. Did the district court err when it denied Mr. Mann's motion to suppress?

II. Did the district court err when it failed to instruct the jury that the State had to prove Mr. Mann possessed the paraphernalia with the intent to use in Idaho?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Mann's Motion To Suppress

A. Introduction

Mr. Mann asserts that the district court erred by denying his motion to suppress based on its determination that he lacked standing to challenge the search of the rental car. In *State v. Cutler*, 144 Idaho 272 (Ct. App. 2007), the Court of Appeals adopted a totality of the circumstances test to determine whether an unauthorized driver has a privacy interest in a rental car. Mr. Mann submits that the Court should modify the *Cutler* test and adopt the approach from Judge Lansing's concurring opinion. Alternatively, if the Court reaffirms *Cutler*, Mr. Mann contends that the totality of the circumstances establishes his privacy interest in the rental car.

B. Standard Of Review

The Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Wulff*, 157 Idaho 416, 418 (2014); *State v. Ellis*, 155 Idaho 584, 587 (Ct. App. 2013). The Court will accept the trial court's findings of fact "unless they are clearly erroneous." *Wulff*, 157 Idaho at 418. Findings of fact are clearly erroneous if they are not supported by substantial and competent evidence. *State v. Danney*, 153 Idaho 405, 408 (2012); *see also Ellis*, 155 Idaho at 587. "At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *Ellis*, 155 Idaho at

587. The Court exercises free review over the "application of constitutional principles in light of those facts." *Wulff*, 157 Idaho at 418.

C. The District Court Erred When It Ruled Mr. Mann Did Not Have A Reasonable Expectation Of Privacy In The Rental Car

"The Fourth Amendment of the United States Constitution protects citizens from unreasonable search and seizure." *State v. Hansen*, 138 Idaho 791, 796 (2003). "Article I, Section 17 of the Idaho Constitution nearly identically guarantees that '[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.'" *State v. Green*, 158 Idaho 884, 886 (2015) (alteration in original). Under the United States and Idaho Constitutions, "[w]arrantless searches and seizures are presumptively unreasonable . . . unless they come within one of the established exceptions to the warrant requirement." *Id.* at 886–87 (citing *California v. Acevedo,* 500 U.S. 565, 580 (1991); *State v. Henderson,* 114 Idaho 293, 295 (1988)).

A threshold issue to challenge an unlawful search is standing. "A person challenging a search has the burden of showing that he or she had a legitimate expectation of privacy in the item or place searched." *State v. Pruss*, 145 Idaho 623, 626 (2008). The determination of a reasonable expectation of privacy involves a two-part inquiry: "(1) Did the person have a subjective expectation of privacy in the object of the challenged search? and (2) Is society willing to recognize that expectation as reasonable?" *Id.*

In the rental car context, the Court of Appeals uses a totality of circumstances test to determine whether an unauthorized driver has a reasonable expectation of

privacy in the car. *Cutler*, 144 Idaho at 275. The Court of Appeals rejected a bright-line rule, such as the Fourth, Fifth, and Tenth Circuit's rule that an unauthorized driver never has standing or the Eighth and Ninth Circuit's rule that an unauthorized driver has standing only if he can show that he had permission from the authorized driver. *Id.* at 274. Instead, the Court of Appeals adopted the test from the Sixth Circuit in *United States v. Smith*, 263 F.3d 571 (6th Cir. 2001). *Cutler*, 144 Idaho at 274–75. Like the Fourth, Fifth, and Tenth Circuits, the Sixth Circuit also had a general rule that an unauthorized driver did not have standing. *Smith*, 263 F.3d at 586. But the Sixth Circuit rejected the government's argument that the rental agreement alone controls whether a driver is authorized. *Id.* The Sixth Circuit reasoned that a "rigid test" was "inappropriate." *Id.* Looking at a number of factors, the *Smith* Court held that an unauthorized driver had standing even though his use of the rental car was a breach of the rental agreement. *Id.* at 586–87. The Court of Appeals in *Cutler* adopted the Sixth Circuit's approach—generally "unauthorized drivers lack standing," but the totality of the circumstances can overcome that presumption. 144 Idaho at 275–76.

1. <u>The *Cutler* Test Should Be Modified To Allow For An Unauthorized Driver With The Lessee's Permission To Maintain A Privacy Interest In The Vehicle</u>

In a concurring opinion in *Cutler*, Judge Lansing wrote in support of a test that combines the Sixth Circuit's totality of the circumstances test and the Eighth and Ninth Circuit's exception for an unauthorized driver with permission. *Cutler*, 144 Idaho at 276 (Lansing, J., concurring). Judge Lansing stated that an unauthorized driver's permission "from the lessee" or other "contractually authorized driver" would be sufficient to establish a reasonable expectation of privacy in the vehicle. *Id.* Otherwise, the general

rule applies—the unauthorized driver lacks standing. *Id.* In "extraordinary circumstances," however, Judge Lansing wrote that an unauthorized driver may have a reasonable expectation of privacy "in the absence of direct permission." *Id.* These "extraordinary" circumstances persuaded Judge Lansing to adopt the Sixth Circuit's totality of the circumstances test with a "heavy burden" on the driver to show the existence of other factors establishing a privacy interest. *Id.* Under Judge Lansing's approach, an unauthorized driver with either permission or other "rare" circumstances could establish a reasonable expectation of privacy in the vehicle.

Mr. Mann submits that the Court should reconsider *Cutler* and adopt Judge Lansing's modified totality of the circumstances test. "Stare decisis requires that th[e] Court follows controlling precedent unless that precedent is manifestly wrong, has proven over time to be unjust or unwise, or overruling that precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *State v. Owens*, 158 Idaho 1, 4–5 (2015). The majority opinion and Judge Lansing's concurrence both start with the general presumption that "unauthorized drivers of rental vehicles do not enjoy a legitimate expectation of privacy in such vehicles." 144 Idaho at 275–76; *id.* at 276 (Lansing, J., concurring). Both allow this presumption to be overcome by the totality of the circumstances. *Id.* at 275 (majority opinion); *id.* at 276 (Lansing, J., concurring). The majority's test considers a number of factors, but not one factor is dispositive. *Id.* at 275 (majority opinion). Judge Lansing's test considers these factors as well, but one particular factor if present—permission by lessee—is dispositive. *Id.* at 276 (Lansing, J., concurring). Mr. Mann submits that this test should control.

Allowing an unauthorized driver to establish a legitimate expectation of privacy with the lessee's permission is consistent with the standing analysis for other non-owner drivers. At its core, the question of standing rests on whether the person has a possessory right or ownership interest in the vehicle. *See Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (search of vehicle did not violate Fourth Amendment rights of passengers who asserted neither a property nor possessory interest in vehicle); *State v. Bottelson*, 102 Idaho 90, 92 (1981) (defendant standing outside a parked car lacked privacy interest when no evidence showed that he "owned or had a right to possess" the car); *State v. Foldesi*, 131 Idaho 778, 780 (Ct. App. 1998). However, mere possession or ownership alone is not determinative. *Foldesi*, 131 Idaho at 780–81; *State v. Hanson*, 142 Idaho 711 (Ct. App. 2006). As such, a non-owner cannot establish a privacy interest in a vehicle by mere possession. *Hanson*, 142 Idaho at 719. But a non-owner's possession coupled with authorization from the owner or a person believed to have authority is sufficient to confer standing. *Id.* The same principle should apply to lessees and unauthorized drivers. Once the rental agreement is executed, the lessee becomes the equivalent of the owner of the vehicle or, at the very least, a person believed to have authority over the vehicle. Therefore, a non-owner's possession, coupled with the lessee's authorization for the non-owner to use the vehicle, should be sufficient to establish the non-owner's privacy interest in the vehicle, even if the non-owner is an unauthorized driver. *See United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006).

In this case, there is no dispute that Mr. Mann had permission of the lessee to drive the vehicle. Mr. Mann testified that his "living as married partner" of five years, Ms. Cheney, knew he would be driving the rental vehicle. (Tr., p.10, L.22–p.11, L.9,

p.11, Ls.16–18.) She helped him pack for the trip, filled up the car with gas, and gave him the keys. (Tr., p.11, L.22–p.13, L.4.) She also knew of his travel destination. (Tr., p.12, Ls.11–14.) Moreover, the State acknowledged that Mr. Mann had Ms. Cheney's permission. (Tr., p.26, Ls.20–21.) In light of the undisputed fact that Mr. Mann had the lessee's permission to drive the car, Mr. Mann asserts that he has satisfied the modified *Cutler* test as set forth by Judge Lansing to establish a reasonable expectation of privacy in the vehicle.

2. In The Alternative, The Facts Are Sufficient For Mr. Mann To Establish A Privacy Interest In The Rental Car Under *Cutler*'s Totality Of The Circumstances Test

If the Court declines to adopt Judge Lansing's approach, Mr. Mann asserts that the facts of this case satisfy *Cutler*'s totality of the circumstances test.

As an initial matter, Mr. Mann asserts that the district court erroneously applied the *Cutler* test by requiring he satisfy the same five factors used in *Smith*. When the Court of Appeals adopted the *Smith* test, the Court of Appeals identified the five factors specifically considered by the Sixth Circuit: 1) whether the defendant had a driver's license; (2) the relationship between the unauthorized driver and the lessee; (3) the driver's ability to present rental documents; (4) whether the driver had the lessee's permission to use the car; and (5) the driver's relationship with the rental company. *Cutler*, 144 Idaho at 275; *Smith*, 263 F.3d at 586–87. The Court of Appeals' discussion of the *Smith* factors, however, was not intended to require that each and every factor be met to establish an expectation of privacy. That rigid application of the test would be inconsistent with the Court of Appeals' rationale for adopting the Sixth Circuit's test. The Court of Appeals reasoned, "Given the increasingly common utilization of rental vehicles

for a myriad of purposes and our view that a bright line rule fails to address the ensuing complexities, we are convinced the Sixth Circuit Court's totality of the circumstances approach best addresses the issue." *Cutler*, 144 Idaho at 275. Thus, the *Smith* factors only provide guidance, and the factors do not take precedence over other relevant facts in the case. In this case, the district court examined the five factors and found that none were satisfied except permission. (Tr., p.29, L.6–p.32, L.10.) Thus, the district court concluded that "under the five *Cutler* factors the totality of the circumstances tilt in favor of no standing." (Tr., p.30, Ls.20–22.) Mr. Mann submits that the district court erred by requiring that he satisfy each factor instead of examining the totality of the circumstances.

Given all the facts here, the totality of the circumstances establishes that Mr. Mann had a reasonable expectation of privacy in the rental car. The most relevant facts are Mr. Mann's permission to drive the rental car and his marriage-like relationship with Ms. Cheney. Mr. Mann and Ms. Cheney lived together for five years, and they have one child together. (Tr., p.10, L.24–p.11, L.2, p.21, L.16–p.22, L.4.) They acted as a married couple in all respects, such as (a) sharing all living expenses, (b) making all parenting decisions together, (c) claiming Mr. Mann as a "dependent" on Ms. Cheney's health insurance, (d) having renter's insurance together, and (e) claiming Mr. Mann "under Ms. Cheney's life insurance policy." (Tr., p.18, L.12, p.19, L.11–p.21, L.15.) Although they did not have a marriage certificate, Mr. Mann and Ms. Cheney's relationship was the equivalent of a marriage. Mr. Mann's permission to drive the rental car from his partner Ms. Cheney was sufficient to create a reasonable expectation of privacy in the rental car.

In light of the strength of the permission and relationship factors, Mr. Mann submits that the remaining *Smith* factors carry little weight in the overall standing analysis. First, Mr. Mann's suspended license should not diminish his expectation of privacy. Whether an unauthorized driver has a driver's license should be afforded minimal significance because drivers in general do not lose standing to challenge unlawful searches simply for failing to have a driver's license. *See, e.g.*, *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (determining legality of warrantless search of vehicle when driver arrested for suspended license); *State v. Stewart*, 152 Idaho 868 (Ct. App. 2012) (determining legality of inventory search of vehicle when driver arrested for suspended license). Second, the absence of evidence on Mr. Mann's presentation of rental documents or his relationship with rental car company is also minimally relevant. *Cf. United States v. Henderson*, 241 F.3d 638, 647 (9th Cir. 2001) (holding lessee with possession and control of rental car had reasonable expectation of privacy even though lease period had expired). These factors should be less significant when the unauthorized driver has the lessee's permission and an established relationship with the lessee. Therefore, based on the totality of the circumstances, the district court erred by concluding Mr. Mann did not have standing to challenge the warrantless search of the rental car.

Assuming Mr. Mann prevails on the standing issue on appeal, he submits that a remand is necessary to resolve the other issues raised in his suppression motion. Specifically, the district court did not address the constitutionality of the warrantless search of the vehicle. Mr. Mann argued in his motion that the warrantless search could not be justified as a search incident to arrest or an inventory search. (R., pp.51–55.) The

State responded. (R., pp.94–94.) The district court did not rule on these issues or make any necessary factual findings. (*See* Tr., p.29, L.2–p.36, L.23 (resolving the suppression motion on standing grounds), p.37, L.17–p.39, L.21, p.61, L.6–p.63, L.23 (reopening the matter to consider legality of traffic stop only). To determine if the warrantless search of the vehicle was lawful—which the State has the burden to prove—Mr. Mann requests that the district court's order denying his motion to suppress be vacated and the case be remanded for another suppression motion hearing.

II.

The District Court Erred When It Failed To Instruct The Jury That The State Had To Prove Mr. Mann Possessed The Paraphernalia With The Intent To Use In Idaho

A. Introduction

Mr. Mann submits that the district court's supplemental jury Instruction No. 21 in response to the jury's question resulted in the incorrect legal instruction on the requisite mental state for possession of drug paraphernalia, a specific intent crime. Instruction No. 21 informed the jury that possession of the paraphernalia in Idaho mattered, but the jurisdiction in which the defendant formed the intent to use the paraphernalia was not of legal significance. This instruction is incomplete and misleading. By instructing the jury that the formation of intent was irrelevant, Instruction No. 21 failed to properly answer the jury's question as to the specific intent element of the offense and incorrectly instructed the jury as a matter of law. The State cannot show that this error was harmless. As such, Mr. Mann's conviction for possession of drug paraphernalia should be vacated and the case remanded for a new trial.

B. Standard Of Review

"Whether the jury has been properly instructed is a question of law over which this Court exercises free review." *State v. Hopkins*, 158 Idaho 191, 195–96 (Ct. App. 2015) (quoting *State v. Severson*, 147 Idaho 694, 710 (2009)). The Court reviews "jury instructions as a whole because '[i]t is well established that [an] instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record.'" *State v. Adamcik*, 152 Idaho 445, 472 (2012) (alteration in original) (quotation marks omitted) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)).

> When a defendant has objected to an instruction, [the Court] will apply the harmless error test articulated in *State v. Perry*, 150 Idaho 209, 227 (2010). Typically, under the harmless error test, once the defendant shows that a constitutional violation occurred, the State has the burden of demonstrating beyond a reasonable doubt that the violation did not contribute to the jury's verdict. *Id.* If the jury reached its verdict based on an erroneous instruction, [the Court] will generally vacate and remand for a new trial. *Id.* at 228. However, where the jury received proper instruction on all but one element of an offense, and where the Court "concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.* (quoting *State v. Lovelace*, 140 Idaho 73, 79, 90 P.3d 298, 304 (2004).

Id.

C. The District Court Improperly Instructed The Jury By Eliminating An Essential Element Of The Offense

Idaho Code § 37-2734A provides: "It is unlawful for any person to use, *or to possess with intent to use*, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, *or otherwise introduce into the human body a controlled substance*." I.C. § 37-2734A(1) (emphasis added).

Possession of drug paraphernalia is a specific intent crime. *State v. Williams*, 134 Idaho 590, 592 (Ct. App. 2000). "[A] specific intent requirement refers to that state of mind which in part defines the crime and is an element thereof." *State v. Fox*, 124 Idaho 924, 926 (1993) (quoting *State v. Gowin*, 97 Idaho 766, 768 (1976)). "Specific intent means a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime." *State v. Lopez*, 126 Idaho 831, 833–34 (Ct. App. 1995) (citation and quotation marks omitted). In contrast, "[a] general criminal intent requirement is satisfied if it is shown that the defendant knowingly performed the proscribed acts." *Fox*, 124 Idaho at 183 (quoting *Gowin*, 97 Idaho at 767–68). As a specific intent crime, to establish a defendant's guilt of possession of drug paraphernalia, the State must prove not only that the defendant possessed the item in question, but also that he intended to use it to introduce a controlled substance into the human body.[2] *Williams*, 134 Idaho at 592.

"In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." I.C. § 18-114. "A union of act and intent jury instruction should generally be given for a general-intent crime." *State v. Beeks*, 159 Idaho 223, 231 (Ct. App. 2015). A defendant is not entitled to a union of act and intent instruction for a specific intent crime, however. *State v. Hoffman*, 137 Idaho 897, 900

[2] For example, in *Williams*, the Court of Appeals stated:

> The information charged that Williams "did possess with the intent to use drug paraphernalia, to wit: a spoon to prepare a controlled substance for intravenous use." Thus, in order to establish Williams' guilt of this offense, the State was required to prove not only that he possessed the small spoon in question but that he had intended to use it to prepare a controlled substance for intravenous introduction into the human body.

(Ct. App. 2002). A union of act and intent instruction is unnecessary for a specific intent crime where the jury is properly instructed on "the specific mental states required for the commission of these offenses." *Id.* In other words, a union of act and intent is required

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134 Idaho at 592.

for all offenses, but, if the jury is properly instructed on the "requisite mental elements" of a specific intent crime, a union of act and intent instruction is duplicative and superfluous.

Here, Mr. Mann asserts that Instruction No. 21 improperly instructed the jury on the specific mental state required for possession of drug paraphernalia. The jury asked the district court if "intending to use" meant "use in Idaho" or "elsewhere." (Aug. R., p.1.) The first two sentences of Instruction No. 21 are correct: (1) the possession of paraphernalia must occur in Idaho and (2) the defendant must intend to use the paraphernalia. (R., p.202.) But the third sentence—"It does not matter in which state the defendant formed the intent to use the paraphernalia"—is improper as a matter of law. (R., p.202.)

Instruction No. 21 is improper because it failed to answer the jury's question and confused the elements of the offense. The instruction refers to the formation of intent, but the formation of intent is not an element of the offense. This reference to "where the defendant formed the intent" is misleading. As a specific intent crime, what matters is whether the defendant had the intent to use the alleged paraphernalia to introduce a controlled substance into the human body in the jurisdiction in which he possessed the paraphernalia. In other words, the essential elements of the offense are satisfied by the act of possession joined with present intent to use in Idaho. *See* I.C. § 18-114 (requiring a union of act and intent for all crimes); *see also State v. Dietrich*, 135 Idaho 870, 872 (Ct. App. 2001) ("In a criminal prosecution, the State must prove subject matter jurisdiction by showing that an essential element of the offense occurred within Idaho."). The district court should have referred the jury to the original instruction on possession

of drug paraphernalia, R., p.191, or simply reiterated that State must prove Mr. Mann had the intent to use the bong in Idaho to introduce a controlled substance into the body. By referring to the formation of intent, and not the present intent to use in Idaho, Instruction No. 21 erroneously signaled to the jury that a determination of the requisite mental state at the time of the criminal act did not matter. Thus, Instruction No. 21 improperly instructed the jury on the specific mental state required for possession of drug paraphernalia.

"An erroneous instruction that relieves the State of its burden to prove an element of a charged crime can be characterized as either a violation of due process, or as a violation of the Sixth Amendment's jury trial guarantee." *State v. Parsons*, 153 Idaho 666, 669 (Ct. App. 2012) (citing *Neder v. United States*, 527 U.S. 1, 12 (1999); *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993); *State v. Draper*, 151 Idaho 576, 588 (2011); *State v. Anderson*, 144 Idaho 743, 749 (2007)). Here, Instruction No. 21 relieved the State of its burden to prove specific intent, and Mr. Mann objected to the instruction. (Tr., p.263, Ls.1–7.) The burden then shifts to the State to establish harmlessness. *Adamcik*, 152 Idaho at 472. Mr. Mann asserts that the State cannot meet this burden. The erroneous mental state element was neither "uncontested" nor "supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Id.* In fact, it is reasonable to assume that the jury was not convinced by State's evidence of intent in light of its questions to the district court. (Aug. R., p.1.) Because the jury reached its verdict based on an erroneous instruction, Mr. Mann submits that his conviction for possession of drug paraphernalia should be vacated and the case remanded for a new trial. *Id.*

CONCLUSION

Mr. Mann respectfully requests that the Court vacate the district court's order denying his motion to suppress and remand the case for further proceedings on his motion to suppress, including a determination of whether the search of the rental car was lawful. Alternatively, he respectfully requests that the Court vacate his judgment of conviction for possession of drug paraphernalia and remand the case for a new trial.

DATED this 2nd day of June, 2016.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of June, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JESSE EUGENE MANN
INMATE #116972
ICIO
381 W HOSPITAL DRIVE
OROFINO ID 83544

JOHN T MITCHELL
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

JCS/eas